

JAN 28 1983

LESLIE STEVENS,  
CLERK

No. 82-1056

IN THE

**Supreme Court of the United States**

October Term, 1982

MARSHALL FIELD & COMPANY,

*Petitioner,*

vs.

RAYMOND ALLEN, *et al.*,

*Respondents.*

**PETITIONER'S REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI.**

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RESPONDENTS HAVE MISCHARACTERIZED THE ISSUE.

### A. The Issue in This Petition Does Not Involve the First Amendment.

The issue in this Petition is whether the District Court had the power to *order* Marshall Field & Company to turn over the names and addresses of hundreds of executives so that a *court-ordered notice* could be sent to these individuals. In an attempt to obfuscate this issue, Respondents argue that the First Amendment prohibits any restraint on the right of plaintiffs to communicate with potential class members. The right of the named plaintiffs under the First Amendment to freely express themselves is not the issue; rather, it is the power of the court to order notice.

**B. The Notice in Issue Is the Court-Ordered Notice of January 1982.**

Respondents also confuse the issue by arguing that the notice sent by the named plaintiffs in October 1982, and not the court-ordered notice in January 1982, is tested by this Petition. Again, Respondents are incorrect. This Petition questions the validity of the court-ordered notice; the second notice occurred after the decision of the Seventh Circuit and therefore cannot be part of this Petition.

**C. A Prohibition Against Court-Ordered Notice Is Not Contrary to *Gulf Oil*.**

Respondents contend that a prohibition against communications by plaintiffs is contrary to *Gulf Oil v. Bernard*, 452 U.S. 89 (1981). This contention is irrelevant since *Gulf Oil* did not address the question of the power of a district court under the ADEA to order notice to potential plaintiffs; rather, *Gulf Oil* dealt with the power of a district court, under Rule 23 of the Federal Rules of Civil Procedure, to ban all communication by named plaintiffs with potential class members. This Court held in *Gulf Oil* that a district court has no such power to impose a blanket prohibition on communications, absent a factual showing of the need for such a prohibition. The Court based its holding on Rule 23 and specifically declined to decide whether such a ban also violated the First Amendment rights of the plaintiffs.

The First Amendment is not involved in this Petition. The issue is not the free speech rights of individuals but rather the power of a court to order notice to potential plaintiffs. Contrary to Respondents' contention, the decision of the Ninth Circuit in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977) is not impacted by the *Gulf Oil* holding or reasoning. As noted above, *Gulf Oil* struck down an absolute ban on communications; *Kinney Shoe* invalidated

a court-approved notice to potential plaintiffs as contrary to the congressional intent rejecting notice. *Kinney Shoe* is still good law and is still in conflict with the decision of the Seventh Circuit in this case.

Dated: January 27, 1983.

Respectfully submitted,

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